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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM DAVIS REED, Defendant and Appellant.	B230107 (Los Angeles County Super. Ct. No. BA369661)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant William Davis Reed appeals from the judgment of conviction following a jury trial in which he was convicted of second degree murder (Pen. Code, § 187, subd. (a))[1] (count 1), possession of a firearm by a felon (§ 12021, subd. (a)(1)) (count 2), and carrying a loaded, unregistered firearm (§ 12031, subd. (a)(1)) (count 3). On count 1, the jury found true the allegation that appellant personally and intentionally discharged a firearm which proximately caused great bodily injury or death (§ 12022.53, subd. (d)). The jury found not true the gang allegations on all counts (§ 186.22, subd. (b)(1)(C)). The trial court sentenced appellant to state prison for 40 years to life as follows: 15 years to life for second degree murder, plus 25 years to life for the firearm enhancement. The court sentenced appellant to the low term of 16 months each on counts 2 and 3, to run concurrently with count 1.

Appellant contends he was deprived of his constitutional rights to a jury trial and the effective assistance of counsel because his lawyer failed to object to the prosecution gang expert's opinion testimony on the ultimate issue to be decided by the jury. He also contends that because he was 18 years old when the shooting occurred, his 40-years-to-life sentence constitutes cruel and unusual punishment. We disagree and affirm the judgment.

FACTS

Prosecution Case

Just before 10:00 a.m. on March 30, 2010, Antonio Moreno was eating a snack in his parked vehicle at Fred Roberts Park in Long Beach when he heard a "crackling" noise like a "firecracker." Seventeen-year-old Jorge Garcia was standing on the sidewalk near a fence holding his stomach. Moreno saw appellant running away from a "pile of cloth," and followed him in his vehicle. Moreno called 9-1-1 and told the operator that an

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[1] All statutory references shall be to the Penal Code, unless otherwise noted.

African-American male wearing a black sweat suit with a hood "shot somebody and left him there laying on the street," and then ran into the Pueblo del Rio housing project.

At 10:00 a.m. Corinna Adams was driving near the park when she saw appellant wearing a black hood running toward train tracks. She turned around and drove back to where she saw a "little boy" lying on the sidewalk. She touched his neck and found a pulse that was "slowly stopping." She did not check his wrist for a pulse because there was a black spot on it.

At approximately 12:45 p.m. that same day, Los Angeles Police Department (LAPD) Officers Kevin Raines and Douglas Bell were in the area of the Pueblo del Rio housing project in an unmarked police car. Officer Raines saw appellant standing between some buildings. As the officers' car slowed down, appellant looked in their direction, reached into his waistband, and ducked down. Officer Raines got out of the car, and announced "LAPD." Appellant started running and the officers chased him. Both officers saw appellant throw a handgun, a .38-caliber chrome revolver, onto the roof of an apartment building. The officers chased appellant for about three blocks and ordered him to stop numerous times. As the officers got closer to appellant, he looked over his shoulder, laid down, and was taken into custody without incident. Officer Bell then used a fire department ladder to retrieve the gun from the rooftop. Two of the six rounds of the revolver were missing. The revolver was not registered to appellant.

LAPD Officer Joel Ruiz testified that he had known appellant since April 2008, when appellant admitted being a Pueblo Bishop Bloods gang member. On February 8, 2010, appellant reaffirmed his gang membership to Officer Ruiz, while being served with a Pueblo Bishop gang injunction. Appellant's photograph was taken at that time, which showed him wearing a red belt with a "P" on the belt buckle. Officer Ruiz testified that the color red signified the Bloods gang and "P" the Pueblo Bishops.

On the day of the murder, LAPD Detectives Julio Benavides and Richard Arciniega spoke with appellant in a recorded interview, portions of which were played at trial. Appellant told the officers that prior to the shooting he was with a female friend,

who made him leave her house because he had a gun. Appellant took the train and got off at Vernon Avenue and Long Beach. He started walking because he was tired of waiting for the train to move. He was chased by two Hispanic gang members in baggy clothes toward Fred Roberts Park. Appellant hid and lost sight of the two gang members. He then encountered a single Hispanic gang member, the victim, who asked him, "Where are you from?" Appellant denied any gang affiliation. The victim then said, "Fuck you," "Fuck Black people," "Fuck Niggers," "I should kill you right now," "This is my neighborhood," and "This is 38th Street hood." The victim reached for his waistband. Appellant was scared and fired two shots.

During the victim's autopsy, one medium caliber bullet was recovered. The forensic pathologist who performed the autopsy testified that the bullet could have come from a .38-caliber revolver. There was also an exit and entry wound on the victim's left wrist. Markings on the wrist indicated the muzzle of the gun was either right against the skin or within half an inch.

Detective Arciniega testified as a gang expert. He has about 23 years of gang experience. The victim had only been a member of the 38th Street gang for a month or less. In his experience, Detective Arciniega had never seen a younger, smaller gang member, without a gun, approach a rival gang member and make statements like, "I should kill you right now," or "where you from."

Detective Arciniega was one of the investigating detectives in the murder of a Pueblo Bishop Bloods gang member by a 38th Street gang member that occurred prior to appellant shooting the victim. Since 2006, eight shootings had occurred between the two gangs, each of which involved one of the gangs going into rival territory and shooting a rival gang member. There was no evidence in any of the eight shootings that the victims had a gun.

The prosecutor asked Detective Arciniega the following question which is now at issue on appeal: "*Do you have an opinion as to whether a member of the Pueblo Bishops would get off the train at Long Beach and Vernon Avenue for any purpose other than to*

do a shooting?" (Italics added.) Detective Arciniega responded: "It's not going to happen. You have Vernon and Long Beach, which is basically in the heart of 38th Street. It's an intersection that goes to the Alameda swap meet, Johnson's Liquor store. It's an area that's well frequented by 38th Street gang members. You have a rival gang member that's going to get off, and the only way to get off that platform, as they refer to them, is to walk out actually onto Vernon Avenue and then decide whether you're going to go east or west. Then you can go north or south on Long Beach if that's what's going to happen. But there's 38 Streeters there. It's an area they sell narcotics in. It's—with the liquor store there, it's an area frequented by 38th Street gang members. Basically, you're going into the heart of rival territory. Whether it's to do a shooting or to assault a rival gang member, that would be the only reason why you'd get off there in my opinion."

When given a hypothetical based on the facts of this case, Detective Arciniega opined that the shooting was done for the benefit of the Pueblo Bishop Bloods gang. He explained that walking into a rival gang's territory and shooting one of its members would put fear in both that gang and community members, and would make the shooter's gang seem "tough."

Defense Case

Alex Alonso, a gang researcher, testified there are more than 900 gangs in Los Angeles County. He was familiar with both the 38th Street gang, whose territory included Fred Roberts Park, and the Pueblo Bishop Bloods, whose primary territory was the Pueblo de Rio housing project. The two gangs are rivals.

Alonso testified that if a gang member had joined a gang for about a month, it was not too short a time for the member to confront an unfamiliar male who came into his gang's territory by asking "where are you from." Alonso opined that a younger, newer gang member would be eager to try to prove himself to his gang. According to Alonso, it was not uncommon for an unarmed newer gang member to confront someone who might be armed, but it was "extremely uncommon" for a gang member alone to shoot a rival

gang member. Alonso opined that a shooting in self-defense by a gang member would not be for the benefit of the gang, but for his own benefit. He also testified that "punking out" or "ranking out" is when a gang member denies being in a gang. It shows disloyalty and can happen if the gang member is scared of being shot or assaulted.

Prosecution Rebuttal

Detective Arciniega testified that it would be uncommon for a gang member to confront a rival gang member without being armed. No firearm was found on the victim.

DISCUSSION

I. Expert Opinion Testimony.

Appellant contends he was deprived of his Sixth Amendment constitutional rights to trial by jury and effective assistance of counsel[2] because his lawyer failed to object to the prosecution gang expert's opinion testimony on the ultimate issue to be decided by the jury—appellant's intent. We disagree.

Opinion testimony "that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.) While expert testimony on hypothetical facts may lead the jury to believe the conclusions are true, such circumstances "makes the testimony probative, not inadmissible. [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 947.) Indeed, hypothetical questions are proper even when directly aimed at a gang member's mental state. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1179 [trial court erred in excluding question as to whether gang members always knew what would happen when they rode with other gang members].)

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[2] We note the Sixth Amendment to the United States Constitution grants to a criminal defendant the rights to trial "by an impartial jury"; "to be confronted with the witnesses against him"; and "to have the Assistance of Counsel for his defence." (U.S. Const., 6th Amend.)

Here, Detective Arciniega's testimony was given in response to a hypothetical question. The prosecutor began the question with, "Do you have an opinion . . . .?" The trial court instructed the jury that witnesses were allowed to testify as experts and to give their opinion, and that while the jury had to consider the opinions, it was not required to accept them as true or correct. (CALCRIM No. 332.) We "'presume that the jurors understand and follow the [trial] court's instructions.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005; *People v. Morales* (2001) 25 Cal.4th 34, 47.) The question was then phrased as to what purpose "a member of Pueblo Bishops" would have for exiting the train where appellant did. The question did not ask about appellant specifically.

The cases on which appellant relies, *People v. Killebrew* (2002) 103 Cal.App.4th 644 and *In re Frank S.* (2006) 141 Cal.App.4th 1192, are inapposite. In both cases, experts testified as to the mental state of the defendants on trial, not to hypothetical gang members, as here. Our Supreme Court clarified in *People v. Gonzalez, supra,* 38 Cal.4th 932, that *Killebrew* is limited to prohibiting expert testimony about a specific defendant's mental state, not hypothetical gang members: "[W]e read *Killebrew* as merely 'prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.' [Citations.] Even if we assume, without deciding, that *Killebrew* is correct in this respect, it has no relevance here. [The expert] merely answered hypothetical questions based on other evidence the prosecution presented, which is a proper way of presenting expert testimony. 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth."' [Citations.] The witness did not express an opinion about whether the particular witnesses in this case had been intimidated. [Citation.]" (*People v. Gonzalez, supra,* at pp. 946–947, fn. omitted.)

The *Gonzalez* court acknowledged that the expert's testimony might lead the jury to conclude that certain witnesses were being intimidated, and therefore their earlier statements were more credible, but the Court held that such circumstances "makes the testimony probative, not inadmissible. [Citation.]" (*People v. Gonzalez, supra,* 38

Cal.4th at p. 947.) As the People point out, other cases have similarly distinguished *Killebrew* on the basis that hypothetical questions were asked. (See *People v. Samaniego, supra*, 172 Cal.App.4th at p. 1179; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513–1514; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550–1551.)

Because the challenged testimony was admissible as a response to a hypothetical question, appellant's trial counsel had no duty to object, and therefore was not ineffective as a matter of law. But even assuming an objection had been made and sustained, it is not reasonably probable that appellant would have received a more favorable result. (*People v. Samaniego, supra*, 172 Cal.App.4th at pp. 1179–1180, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; *Strickland v. Washington* (1984) 466 U.S. 668, 687 [applying same standard to ineffective assistance claims].)

The jury found not true the gang allegations, despite Detective Arciniega's opinion testimony that the shooting was committed for the benefit of appellant's gang. The jury likewise could have decided not to accept the detective's opinion that the only purpose for a member of appellant's gang to exit the train where he did was to attack or shoot a rival gang member. Appellant claims that had the jury not heard Detective Arciniega's opinion as to intent, it would have convicted him of voluntary manslaughter instead of murder. But this argument assumes the jury believed appellant's claims of self-defense. The jury heard appellant's recorded statements to the police. That the jury did not believe his self-serving claims that he shot the victim in self-defense, is clearly reflected in the jury's rejection of both perfect and imperfect self-defense, on which it was instructed. Additionally, the jury heard evidence that Moreno saw appellant shoot the victim. And appellant had no reasonable explanation for why he was in rival gang territory with a loaded firearm.

II. Cruel and Unusual Punishment.

Appellant contends his sentence of 40-years-to-life constitutes cruel and unusual punishment in violation of the federal and state Constitutions. Specifically, he argues

that he "was only 18 years old and should not be subjected to an indeterminate sentence for second degree murder because this would be grossly disproportionate to his individual culpability." We disagree.

As an initial matter, we note that "[w]hether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) "[S]ection 12022.53, subdivisions (d) and (e)(1), requires the trial court to impose a consecutive sentence if the enhancement created by that section has been proven; therefore, the trial court was without discretion to impose the two 25-year-to-life terms concurrently." (*People v. Elm* (2009) 171 Cal.App.4th 964, 971.) Thus, "[t]he issue before us is not whether the trial court abused its discretion by failing to impose the indeterminate terms concurrently—which it was prohibited from doing—but whether the sentence the trial court was required to impose on defendant by statute constitutes cruel or unusual punishment." (*Id.* at pp. 971–972.)

Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel or unusual punishment."[3] A sentence may violate this prohibition if "'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*).)

California courts "use a three-pronged test to determine whether a particular sentence is disproportionate to the offense for which it is imposed. First, we examine 'the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.' [Citation.] Second, we compare the punishment imposed with punishments prescribed by California law for more serious offenses. [Citation.] Third, we compare the punishment imposed with punishments prescribed by

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[3] Despite appellant's claim that his sentence also violates the federal Constitution, appellant fails to cite or discuss the Eighth Amendment to the United States Constitution, which states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.)

other jurisdictions for the same offense. [Citation.]" (*People v. Elm, supra,* 171 Cal.App.4th at p. 972.) Because a defendant must overcome a "'considerable burden'" to show his sentence is disproportionate to his level of culpability, findings of disproportionality have occurred with "'exquisite rarity in the case law.'" (*Ibid.*) Defining crime and determining punishment are matters uniquely legislative in nature, and courts will not question the validity of legislatively enacted punishments unless their """"constitutionality clearly, positively, and unmistakably appears."""" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 569.)

Appellant addresses only the first prong, relying on *Dillon*, in which our Supreme Court held the defendant's life sentence was cruel and unusual punishment under the California Constitution. There, the 17-year-old defendant and some classmates decided to steal marijuana from an illegal marijuana farm and armed themselves with various weapons. During the course of the raid, one of the boys accidentally fired his shotgun twice, several minutes apart. The defendant thought his friends were being shot by the owner and guards of the farm. The boys started to leave when they heard the owner of the farm approaching through the bushes, then saw he was carrying a shotgun. As the owner approached them, the defendant feared for his life and rapidly fired his semi-automatic rifle, hitting the owner nine times. (*People v. Dillon, supra,* 34 Cal.3d at pp. 451–452, 482–483.) The jury found the defendant guilty of murder on a felony-murder theory, and the trial court sentenced him to the statutorily required term of life imprisonment. (*Id.* at p. 487.)

In finding the defendant's life sentence was disproportionate to his crime, the *Dillon* Court focused on the personal characteristics of the defendant, particularly as they related to his age, maturity, absence of a criminal history and his individual culpability in the crime. The Court highlighted several points: (1) the jury stated its severe misgivings about applying the felony murder rule to the facts of the case; (2) the defendant was an unusually immature boy who did not foresee the risk he was creating; (3) the defendant had no prior criminal history and "was not the prototype of a hardened criminal who

poses a grave threat to society"; and (4) the defendant's accomplices received only minimal punishments. (*People v. Dillon, supra*, 34 Cal.3d at p. 488.) For these reasons, the Court held the defendant's punishment as a first degree murderer with life imprisonment was cruel or unusual, and reduced his conviction to second degree murder. (*Id*. at p. 489.)

Appellant does not address his own personal situation, other than to state his age at the time of the shooting. But we agree with the People that his situation is not similar to that of the defendant in *Dillon*. First, there is no indication from the record that appellant, who committed the murder one month before his 19th birthday, was unusually immature. Second, the probation report shows that appellant had a criminal history dating back four years before the shooting: In March 2006, as a juvenile, appellant was ordered to "suitable placement" on a sustained petition for criminal threats with the intent to terrorize; in November 2006, as a juvenile, appellant was ordered to "suitable placement" on a sustained petition for robbery and second degree robbery; in August 2007, as a juvenile, appellant violated probation and was declared a ward and ordered home on probation; and in August 2009, as an adult and only seven months before the current offense, appellant was convicted of carrying a loaded firearm by a street gang member and was placed on 36 months formal probation. Appellant was still on probation at the time of the shooting. Finally, the jury in appellant's case expressed no misgivings about the case or trying him as an adult, and reached a verdict after deliberating for less than a day.

Numerous California cases decided after *Dillon* have upheld life sentences for defendants under 18 years of age, against cruel or unusual punishment challenges. (See *People v. Elm, supra*, 171 Cal.App.4th at p. 975 [citing several cases and itself upholding two consecutive 25-years-to-life terms for defendant who was 15 years old at the time of the crimes]; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 12–16 [same age and sentence]; *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 87–89 [upholding 25-years-to-life sentence of a 17-year-old convicted of felony murder].)

We are satisfied appellant's sentence of 40-years-to-life for murder is not cruel and unusual under the California Constitution.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST